UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

GAIL MARIE HAKLEY,

Defendant.
_____/

Case No. 1:02-CR-159

HON. RICHARD ALAN ENSLEN

OPINION

This matter is before the Court to resentence Gail Marie Hakley, a/k/a Gail Marie Sparks, for the offense of Identity Theft in violation of 18 U.S.C. § 1028(a)(7). The Court originally sentenced Defendant on November 20, 2002, to 24 months incarceration, followed by three years of supervised release. At the sentencing, the Court denied Defendant's objection that she was entitled to a two-level reduction in her offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. The Court based its denial in part on the fact that Defendant continued to steal money after she admitted the instant offense and in part on the presentence investigator's finding that Defendant rationalized her conduct and deflected blame onto others. (Nov. 20, 2002 Hr'g Tr., p. 55).

Defendant appealed her sentence to the Sixth Circuit Court of Appeals, which vacated her sentence and remanded to this Court for resentencing. The Sixth Circuit found this Court erred when it denied Defendant a reduction in her offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. The court ruled that this Court erroneously considered Defendant's conduct after she admitted to the offense but before she entered her plea and erroneously considered

information regarding Defendant's mental state rather than her actual conduct. As a result, this case has been remanded for resentencing in order to determine: 1) whether Defendant is entitled to a two-level reduction for acceptance of responsibility under § 3E1.1(a), and 2) if so, whether Defendant is entitled to an additional one-level reduction under § 3E1.1(b).

On June 24, 2004, seven days after the Sixth Circuit issued its Opinion remanding this case but on the same day the Mandate was issued, the Supreme Court decided the case *Washington v. Blakely,* 124 S. Ct. 2531 (June 24, 2004). *Blakely* redefined the term "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 2537 (emphasis in original). As a result, under the standard set by *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000), "any fact that increases the penalty for a crime beyond [the maximum that may be imposed solely on the basis of facts reflected in the jury verdict or admitted by the defendant] must be submitted to a jury, and proved beyond a reasonable doubt." Although *Blakely* found only that the application of Washington state's sentencing guidelines violated the Sixth Amendment, its holding calls into question the validity of all determinate sentencing schemes, including the United States Sentencing Guidelines. As a threshold matter, however, this Court must first decide whether *Blakely* must be taken into consideration in this case.

Under the "law of the case" doctrine, a district court on remand is bound by the Mandate issued by the appellate court, unless controlling authority issues a subsequent contrary view of the law. *United States v. Moored,* 38 F.3d 1419, 1421 (6th Cir. 1994). Although the Opinion on which the Mandate in this case is based was issued before the Supreme Court's decision in *Blakely*, the Mandate itself was issued after *Blakely;* therefore there has been an intervening

change in law which authorizes this Court to look beyond the Mandate and consider *Blakely's* impact on this case, if any. Although the United States argues the Court cannot consider *Blakely* because the original sentence was imposed on November 20, 2002, a year and a half before *Blakely*, the Court rejects this argument because *Moored* directs the sentencing court to "begin anew" on remand. *Id.* at 1422.

The effect of *Blakely* on the United States Sentencing Guidelines may be decided in the near future, as the United States Supreme Court has granted certiorari in the consolidated cases of *United States v. Booker* and *United States v. Fanfan* (U.S. Aug. 2, 2004) (Nos. 04-104, 04-105). As a result, some courts have decided to delay sentencings until the status of the Guidelines is determined by the Supreme Court. For example, the United States District Court for the Southern District of Ohio has issued a thirty-day moratorium on all sentences that may be affected by *Blakely*. Dan Horn, *Rulings Put Courts in Turmoil,* CINCINNATI ENQUIRER, July 15, 2004, at 1A. Similarly, the Southern District of West Virginia has postponed all sentencing hearings until after October 15, 2004. *United States v. Thompson*, No. 03-187, 2004 U.S. Dist. LEXIS 13213, at *2 (S.D. W. Va. July 14, 2004). In a brief to the United States District Court for the Northern District of Indiana, the United States Attorney argues for a stay in all scheduled sentencing hearings pending resolution of the issue by the United States Supreme Court on the basis that "[t]here is just too much uncertainty to proceed at this time." Pl.'s Mem. in Supp. of Mot. for *en banc* Determination, *available at* http://www.innd.uscourts.gov/docs/blakely/blakely_comb%20motion%20en%20banc.pdf.

This Court finds the need to sentence defendants expeditiously outweighs the benefits of waiting for the Supreme Court to act. Federal Rule of Criminal Procedure 32(b) requires the

Court to impose sentence without unnecessary delay. Although the Supreme Court has granted petitions for certiorari in *Booker* and *Fanfan,* those cases will not be heard until October, and a decision may not be issued for several months. Furthermore, it is far from certain that an opinion from the Supreme Court will resolve all the issues that have been raised in *Blakely's* aftermath, and many questions will likely remain for the lower courts to decide. In the meantime, the fates of countless defendants would be held in limbo as they wait for courts to decide whether and when the guidelines apply. *United States v. Muefflemen,* No. 01-10387, 2004 U.S. Dist. LEXIS 14114, at *22 (D. Mass. July 26, 2004). In light of the large number of criminal defendants who could be adversely affected by a stay in proceedings, the Court will not issue a moratorium or stay and will not postpone any sentencing hearings solely to await resolution of *Blakely.*[1]

Having decided that the Court may consider what effect, if any, *Blakely* may have on the applicability of the United States Sentencing Guidelines to Defendant's sentence, the Court will now turn to the issue of whether the sentencing guidelines remain valid as binding authority after *Blakely*.

The first question the Court must ask is whether *Blakely* applies to the United States Sentencing Guidelines. Only the Fourth and Fifth Circuits have declared that it does not. *United States v. Hammoud,* No. 03-4253, 2004 U.S. App. LEXIS 15898 (4th Cir. Aug. 2, 2004), *Op. to be issued later; United States v. Pineiro,* No. 03-30437, 2004 U.S. App. LEXIS 14259 (5th Cir. July 12, 2004). The other three circuits that have decided this issue have found that *Blakely* does apply to the United States Sentencing Guidelines. *United States v. Mooney,* No. 02-3388, 2004

[1]In fact, this Defendant is in a halfway house, seeking employment, and is therefore now completing her incarceration, and she has petitioned the Court to absent herself from re-sentencing, which petition has been granted.

U.S. App. LEXIS 15301 (8th Cir. July 23, 2004);[2] *United States v. Ameline,* No. 02-30326, 2004 U.S. App. LEXIS 15031 (9th Cir. July 21, 2004); *United States v. Booker,* No. 03-4225, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004).[3]

This Court agrees with the majorities in the Seventh, Eighth, and Ninth Circuits that *Blakely* does apply to the United States Sentencing Guidelines because of the similarities between the federal and Washington state's sentencing systems, and because of the wording of *Blakely* itself.

Both the federal guidelines and Washington state's guidelines create two "maximum sentences" and allow judges to enhance a defendant's sentence above a recommended guideline range based on facts that have not been admitted by the defendant and have not been proved beyond a reasonable doubt. *United States v. Einstman,* No. 04-97, 2004 U.S. Dist. LEXIS 13166, at *10 (S.D. N.Y. July 14, 2004). Those judges that have found *Blakely* inapplicable to the United States Sentencing Guidelines rely on the fact that the sentencing guidelines in *Blakely* were statutes enacted by the state legislature rather than guidelines promulgated by a commission. *Pineiro,* 2004 U.S. App. LEXIS 14259, at *26-27; *Mooney,* 2004 U.S. App. LEXIS 15301, at *47-48 (Murphy, J., dissenting); *Ameline,* 2004 U.S. App. LEXIS 15031, at *47-48

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[2]The Eighth Circuit Court of Appeals granted rehearing *en banc* in this case on August 6, 2004. Although the decision in *Mooney* is consequently vacated, the Eighth Circuit adopted the reasoning in *Mooney* in the case *United States v. Pirani,* No. 03-2871, 2004 U.S. App. LEXIS 16117 (8th Cir. Aug. 5, 2004), which remains valid.

[3]The Sixth Circuit found *Blakely* applied to the United States Sentencing Guidelines in *United States v. Montgomery*, No. 03-5256, 2004 U.S. App. LEXIS 14384 (6th Cir. July 14, 2004); however, this opinion was later vacated due to the Sixth Circuit granting a rehearing *en banc*, 2004 U.S. App. LEXIS 15017 (6th Cir. July 19, 2004). On July 23, 2004, the Court dismissed the case pursuant to a Motion filed by Defendant-Appellant Montgomery, 2004 U.S. App. LEXIS 15648 (6th Cir. July 23, 2004). On July 27, 2004, the Sixth Circuit granted a petition for rehearing *en banc* in the case *United States v. Koch*, No. 02-6278, another case that addresses the impact of *Blakely* on federal sentencing guidelines. Oral argument in that case is currently scheduled for August 11, 2004. Until that case is decided, there is no binding Sixth Circuit caselaw with respect to this issue.

(Gould, J., dissenting); *Booker*, 2004 U.S. App. LEXIS 14223, at *35-36 (Easterbrook, J., dissenting). However, this distinction loses force in light of the fact that Congress ultimately ratified the guidelines and has the authority to "revoke or amend any or all of the Guidelines... at any time." *Ameline*, 2004 U.S. App. LEXIS 15031, at *22; *Booker*, 2004 U.S. App. LEXIS 14223, at *6 (both quoting *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989)).

Although the Supreme Court has previously upheld the United States Sentencing Guidelines in the face of constitutional challenges, it has never done so under the *Sixth* Amendment, which was the amendment at issue in *Blakely*. *See Booker*, 2004 U.S. App. LEXIS 14223, at *14-15 (citing *Edwards v. United States*, 523 U.S. 511 (1998)); *Ameline*, 2004 U.S. App. LEXIS 15031, at *24 (citing *Booker* and *Edwards*). The majority in *Pineiro*, 2004 U.S. App. LEXIS 14259, at *20-21; the dissent in *Booker*, 2004 U.S. App. LEXIS 14223, at *21; and the dissent in *Ameline*, 2004 U.S. App. LEXIS 15031, at *48, all argue that the Supreme Court has implicitly rejected a Sixth Amendment challenge to the guidelines in *Edwards* and other cases. However, this Court believes *Blakely*'s redefinition of the term "statutory maximum" has changed the judicial landscape too much for the guidelines to be propped up by mere implication. *See Booker*, 2004 U.S. App. LEXIS 14223, at *15.

Finally, the majority in *Blakely* never explicitly denied the dissent's argument that its decision would affect federal sentencing guidelines. *Booker*, 2004 U.S. App. LEXIS 14223, at *7. In her dissent in *Blakely*, Justice O'Connor warned that "[o]ver 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy." 124 S. Ct. at 2550. In response, the majority merely asserted in a footnote that "[t]he Federal Guidelines are not before us, and we express no opinion on them" *Id.* at 2538 n.9. As noted in *Booker*, 2004

U.S. App. LEXIS 14223, at *11, none of the four dissenting justices in *Blakely* were able to find a meaningful difference between Washington's sentencing guidelines and the United States Sentencing Guidelines. The majority's silence on this point suggests it was also unable to do so. Because the federal guidelines are virtually indistinguishable from Washington state's, the Court finds that *Blakely* applies to the federal guidelines and that the Guidelines violate the Sixth Amendment insofar as they allow a sentence to be based on facts that are neither determined by a jury nor admitted by the defendant. The question then becomes whether the Guidelines still have force in those cases in which the defendant's sentence is not increased. A related question is whether upward enhancements can be severed from the rest of the Guidelines so that at least some of the Guidelines remain valid. For the reasons listed below, the Court finds that the answer to both of these questions is "no."

Both the Seventh and Ninth Circuits have found that *Blakely*'s effect is limited to only those cases in which a defendant's sentence is increased based on facts not admitted or proven beyond a reasonable doubt. *Ameline,* 2004 U.S. App. LEXIS 15031, at *40; *Booker,* 2004 U.S. App. LEXIS 14223, at *12. The Seventh Circuit chose to defer the question of whether the Guidelines themselves were in fact severable, while the Ninth Circuit found that they were. *Ameline,* 2004 U.S. App. LEXIS 15031, at *40; *Booker,* 2004 U.S. App. LEXIS 14223, at *19. The United States argues the Guidelines are not severable but do still apply when upward enhancements are not at issue. Mem. from James Comey, Deputy Attorney Gen., to All Fed. Prosecutors 2 (July 2, 2004), *available at* http://www.ussguide.com/members/BulletinBoard/Blakely/DOJMemo.pdf. However, this Court agrees with the Eighth Circuit that the Guidelines are not severable and that *Blakely* therefore

renders them wholly unconstitutional in all cases. *Mooney*, 2004 U.S. App. LEXIS 15301, at *42-43, *reh'g en banc granted* (Aug. 6, 2004), *followed by Pirani*, 2004 U.S. App. LEXIS 16117, at *21-22.

The main problem with severing the Guidelines is that there is no indication that the drafters of the Guidelines intended them to be severable. The Guidelines do not contain a severability clause, which suggests that they are intended to operate either together or not at all. *United States v. Croxford*, No. 02-302, 2004 U.S. Dist. LEXIS 14250, at *43 (D. Utah June 29, 2004). They were designed as an intricate set of both upward enhancements and downward departures, and to allow one but not the other would "effectively eviscerate Congress' expressed intention." *United States v. Marrero*, No. 04-86, 2004 U.S. Dist. LEXIS 13593, at *8 (S.D. N.Y. July 21, 2004); *Einstman*, 2004 U.S. Dist. LEXIS 13166, at *21.

The Ninth Circuit in *Ameline* argued the guidelines are severable under the principle that "'a court should refrain from invalidating more of the statute than is necessary' because '[a] ruling of unconstitutionality frustrates the intent of the elected representative of the people.'" 2004 U.S. App. LEXIS 15031, at *34 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)). However, this Court finds that the Guidelines must be struck down in their entirety because severance would frustrate at least two of the three objectives of the Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, cmt. n.3 (1987) (listing the three objectives of the Guidelines as honesty, uniformity, and proportionality). A sentencing system that applies only in certain cases or that allows for decreases but not increases in a defendant's sentence is neither uniform nor proportional.

Isolating those guidelines that increase a defendant's sentence beyond the "statutory maximum" presents practical problems as well. For example, *Blakely* concerns may arise not only when a defendant's offense level is increased under the Guidelines but also when his base offense level is determined. *See, e.g.*, U.S.S.G. § 2A2.3 (setting a higher base offense level for assault involving physical contact or possession of and threat with a dangerous weapon); U.S.S.G. § 2D1.1(c) (setting different base offense levels depending on the quantity of drugs involved); U.S.S.G. § 2E5.1 (setting different base offense levels depending on whether the offense involved a "bribe" or a "gratuity"); U.S.S.G. § 2K2.1 (setting different base offense levels for firearms offenses depending on the nature of the previous offense); U.S.S.G. § 2M1.1 (setting different base offense levels for treason when "the conduct is tantamount to waging war against the United States"). Once these offending sections are removed, the remaining patchwork of guidelines hardly resembles the comprehensive system originally envisioned and implemented by Congress.

Furthermore, because the Guidelines were created under the assumption that they would be applied by a judge rather than a jury, the use of sentencing juries to determine all enhancements beyond a reasonable doubt presents both practical and philosophical problems. First, the use of sentencing juries would almost certainly require a complete reworking of the sentencing statutes and guidelines. *Croxford*, 2004 U.S. Dist. LEXIS 14250, at *36. Second, juries that were designed to determine questions of guilt or innocence may be ill-equipped to interpret the extensive, nuanced, and interrelated guidelines; for example, jury instructions would in some cases contain two different definitions of terms like conspiracy and entrapment, one for determining guilt or innocence under the statute and another for determining whether a particular

guideline applies. *Muefflemen*, 2004 U.S. Dist. LEXIS 14114, at *40; *see also United States v. Medas*, No. 03-1048, 2004 U.S. Dist. LEXIS 12135 (E.D. N.Y. July 1, 2004) (presenting a twenty-page special-verdict form under *Blakely*). Finally, enhancements based on conduct that occurs during or after trial, like perjury, obstruction of justice, and intimidation, could not be applied at all. Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 Fed. Sent. Rep. (forthcoming June 2004). For all these reasons, the Court finds the Sentencing Guidelines cannot be applied in a piecemeal fashion and therefore are not severable.

Having found that application of the Sentencing Guidelines violates the Sixth Amendment and that they are not severable, the Court finds that their use is prohibited by *Blakely* in all cases. *See United States v. King*, No. 04-35, 2004 U.S. Dist. LEXIS 13496, at *25 (M.D. Fla. July 19, 2004) ("The suggestion that courts use the Guidelines in some cases but not others is at best schizophrenic and at worst contrary to basic principles of justice, practicality, fairness, due process, and equal protection"). The court in *United States v. Thompson* found that the Guidelines are still applicable in those cases in which upward enhancements are not at issue because any attempt to strike the guidelines down in their entirety would essentially constitute an invalid "facial challenge." No. 04-95, 2004 U.S. Dist. LEXIS 12582, at *11 (D. Utah June 28, 2004). It is true that a statute cannot be struck down as *unconstitutional* in its entirety unless it is found to operate unconstitutionally in all cases. However, the Sentencing Guidelines are not being struck down under a facial challenge to their constitutionality but rather because the unconstitutional sections of the Guidelines cannot be severed from the constitutional ones without circumventing *Congressional* intent. *See Croxford*, 2004 U.S. Dist. LEXIS 14250, at *43 (finding that drafters of the Guidelines intended them to work as a single unit); *Muefflemen*,

2004 U.S. Dist. LEXIS 14114, at *46 n.37 (rejecting the argument that the Guidelines are being struck down under a facial challenge).

The Court believes the Guidelines should be returned to their originally intended state, a system designed to structure rather than dictate judicial discretion. *See Muefflemen*, 2004 U.S. Dist. LEXIS 14114, at *9 (describing how the guidelines were transformed from an advisory tool into a set of "mandatory rules, mechanistically applied"). Even before *Blakely*, problems with the Guidelines were becoming apparent, as judges attempted to wrest discretion back from the ever-tightening grip of the Sentencing Commission, and Congress. These problems were exacerbated by passage of the "Feeney Amendment," Pub. L. No. 108-21, § 401, 117 Stat. 650, 657 (2003), which limited the authority of federal judges to depart downward from the Guidelines and limited to three the number of judges on the seven-person Sentencing Commission. *See United States v. Green*, No. 02-10054, 2004 U.S. Dist. LEXIS 11292, at *62 (D. Mass. June 18, 2004) (describing history of the Feeney Amendment and arguing "today the district court judiciary is nothing more than a nuisance to the Departmental drive to control all aspects of sentencing").

Most recently, just days before *Blakely*, the District Court of Massachusetts ruled that the United States Sentencing Guidelines were unconstitutional. *Id.* at *162. That case recounts the long and convoluted history of the Guidelines and lists the myriad of problems that have emerged as the Guidelines evolved into their present state, such as the shift in power over sentencing from judges to prosecutors. While the Court will not repeat that history here, it notes that this case also illustrates one of the many problems that permeated the Guidelines even before *Blakely*. In the instant case, the Opinion would seem to prevent a trial court from analyzing whether a

defendant has accepted responsibility based on anything other than her conduct after she has pled guilty. Therefore, the Court could not consider either the opinions of trained counselors and probation officers or the Defendant's own conduct that occurred after she admitted her conduct but before she pled guilty. As noted in *Green,* this interpretation of § 3E1.1 "has nothing whatsoever to do with true acceptance of responsibility for one's acts" but is instead simply a discount for pleading guilty. *Id.* at *21.[4]

By treating the Guidelines as advisory rather than mandatory, judges will gain the benefits of having a comprehensive set of recommendations available to them while avoiding the drawbacks of being forced to follow those recommendations even when they are clearly inapplicable. Contrary to the arguments made by opponents of a return to indeterminate sentencing, the implementation of an advisory guideline system would not raise the same Sixth Amendment concerns as does a determinate system of guidelines. As the majority noted in *Blakely,*

> the *Sixth Amendment* by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty.

124 S. Ct. at 2540.

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[4]The phrase "acceptance of responsibility" seems particularly inaccurate in cases such as this one, where the Defendant has been in federal custody since the time of her plea. Because the Court is restricted to considering only conduct that occurred after the entry of a guilty plea, some defendants will be rewarded "acceptance of responsibility" reductions simply for being in custody and consequently unable to continue criminal activity. Such limitations on the Court's power to exercise its judgment and discretion seem almost directly contrary to the commentary to the Guidelines themselves, which explicitly advises the Court to consider a defendant's "voluntary" actions. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, cmt. n.1 (2003).

The dissent in *Blakely* notes that one of the problems that existed under the previous system of indeterminate sentencing was the potential for unfair disparities, particularly race-based disparities, in sentencing. 124 S. Ct. at 2544 (O'Connor, J., dissenting), 2554 (Breyer, J., dissenting). While such concerns are valid and remain an issue whenever the exact sentence to be imposed is left to the discretion of an individual or group of individuals, these problems are alleviated by the fact that the Sentencing Guidelines will continue to serve as guideposts, informing judges of sentences that have been imposed in similar cases. *See Muefflemen,* 2004 U.S. Dist. LEXIS 14114, at *47 (sentencing guidelines have "created a common vocabulary in terms of which [judges] can compare cases and like or unlike defendants").

For all the above reasons, the Court finds that *Blakely* not only applies to the United States Sentencing Guidelines, but invalidates them in their entirety and in all cases. As a result, the Court will take the course of action recommended by the Eighth Circuit and will treat the guidelines as non-binding but advisory. *Mooney,* 2004 U.S. App. LEXIS 15301, at *43, *reh'g en banc granted* (Aug. 6, 2004), *followed by Pirani,* 2004 U.S. App. LEXIS 16117, at *21-22. This is also the approach originally recommended by the Sixth Circuit in *Montgomery,* 2004 U.S. App. LEXIS 14384, at *10, *vacated by* 2004 U.S. App. LEXIS 15017 (6th Cir. July 19, 2004).

The Court finds that this case provides one instance in which the Guidelines, while serving as a useful reference, do not prescribe the appropriate sentence for the Defendant. In this case, the Defendant stole Social Security checks from her daughter months after she originally admitted the instant offense to the police. Additionally, any claims that she accepted responsibility are directly contradicted by the findings of the presentence investigator, a probation officer trained in evaluating defendants who has personally met with the Defendant.

This Court cannot say a defendant has accepted responsibility for her crime when she "consistently minimizes her behavior and is more concerned about herself and making excuses for her actions than being truly contrite." (Presentence Rep., p. 2. Resp. to Obj. No. 2).

In this case, the knowledge and insight of the presentence investigator was not captured by the Guidelines, which allow only for the rigid application of quantifiable, "objective" criteria. As a result, the Court finds that its original sentence of 24 months imprisonment, to be followed by three years of supervised release, is correct. Should the Sentencing Guidelines later be found to be constitutional, the Court will resentence Defendant. However, the Court will not issue an alternate sentence at this time. Any pronouncement of an alternate sentence would be mere *dicta* and of little use to the court. *See United States v. Zompa,* No. 04-46, 2004 U.S. Dist. LEXIS 14335, at *7 (D. Me. July 26, 2004) ("any other sentence [the Court] might render in this case is best determined at a later date when the Court can fully consider any nuances of subsequent appellate decisions that might require resentencing"). Furthermore, in many cases, courts would have to impose at least three alternative sentences for defendants: one applying the Guidelines in their entirety, one applying all Guidelines except those that enhance a defendant's sentence, and one non-Guidelines sentence. Comey Mem., at 4, *available at* http://www.ussguide.com/members/BulletinBoard/Blakely/DOJMemo.pdf. Finally, the benefits of alternative sentences are unclear given the fact that the alternative sentence could not be imposed without further hearing. *See* Fed. R. Crim. P. 32(4) (court must allow parties and victim to speak before imposing sentence).

For all the above reasons, the Court finds the United States Sentencing Guidelines are unconstitutional under *Blakely v. Washington* and as a result are no longer binding on the Court

in this or any other case. The Court will resentence Defendant to 24 months imprisonment, followed by three years supervised release.

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:
August 12, 2004